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*Wrecking Co. v. The Katie*, 3 Wood's R. 182; *Hatton v. The Melita*, 3 Hughes R. 494. When no voyage has intervened, the various repairs put on the ship during her stay in port will, in contemplation of the law, be deemed contemporaneous: *The Fanny*, 2 Lowell 508.

A mortgage on a ship is not a lien in the admiralty, and in the distribution of a fund, the mortgagee will be postponed to all claimants who have maritime liens; whether or not he should be preferred to material-men claiming under quasi maritime liens is doubtful.<sup>1</sup> It must be admitted that the status of parties, claiming under liens which have herein been considered as quasi maritime, is still far from satisfactory.

It is to be regretted that Congress has not yet thought fit to pass a uniform law regulating the rights of material-men, instead of leaving the liens of material-men in the home port of the vessel to the mercies of the legislatures of the various states. The life tenure, industry and varied learning of the federal judiciary have been the means by which the maritime law of the United States has been placed on a basis of which we may well be proud; but as long as liens varying in character and framed for proceedings in common-law courts are enforced in another forum, and one in which an opposite jurisprudence prevails, the rights of suitors must necessarily be doubtful, and the symmetry of the law be impaired.

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## MECHANICS' LIEN ON PERSONAL PROPERTY.

I. DEFINITION.—NATURE.—POSSESSION.—The term "lien" is a Norman-French word, and literally means a tie, bond or connection. At common law it is defined to be a mere right in one man to retain personal property in his possession belonging to another, until certain demands of him, the person in possession, are satisfied: *Hammonds v. Barclay*, 2 East 235; *Doane v. Russell*, 3

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<sup>1</sup> The lien of the mortgagee has been sustained in the following cases: *Underwriters' Wrecking Co. v. The Katie*, 3 Woods's R. 182; *Baldwin v. The Bradish Johnson*, 3 Id. 582. But the general current of authority is contra.

Gray 382. In courts of equity the term "lien" is used as synonymous with a charge or encumbrance upon a thing when there is neither *jus in rem* nor *ad rem*, nor possession of the thing.

A "lien" is a vested right (*Jordan v. Wimer*, 45 Iowa 65), and as such is protected by the Constitution of the United States: *Gunn v. Barry*, 15 Wall. 610. Legislative power cannot impair it: *Hannahs v. Felt*, 15 Iowa 141; *Lefever v. Witmer*, 10 Penn. St. 505. At common law it is nothing more than a personal right, and therefore unassignable: *Daugbigny v. Duval*, 5 Durnf. & East 604; *Ruggles v. Walker*, 34 Vt. 470; *Wing v. Griffin*, 1 E. D. Smith 162; *Cairo & Vincennes Railway v. Fackney*, 78 Ill. 116. It is so far a personal right that an officer cannot take in execution property which the debtor holds in respect of a lien only: *Legg v. Evans*, 6 Mees. & Wels. 36. A lien is a collateral security, because a suit may be brought on the debt without impairing the right to retain the property (*Gerrard v. Moody*, 48 Ga. 96), and as such security it is frequently more available than the debt itself.

A lien depends upon contract (*Allen v. Ogden*, 1 Wash. C. C. Rep. 174), express or implied: *Baker v. Hoag*, 7 Barb. 117; but though dependent upon it, the lien forms no part of the contract: *Frost v. Ilsley*, 54 Me. 345. This right is favored because it is founded on natural justice; it operates to prevent circuity of action, and applies to all actions, whether founded on contract or upon tort: 3 Pars. Cont., 6 ed. 235. As a set-off it is restricted to the particular debt for which it is a security. A debt owed by the party who holds the lien can be set off against that for which he holds the lien only by his consent: *Pinnock v. Harrison*, 3 Mees. & Wels. 532. The right is founded on the fact that the mechanic has bestowed labor and means upon the property, at the request and in the manner directed by the owner: *Mathias v. Sellers*, 86 Penn. St. 486; *Chase v. Whitmore*, 5 Maule & S. 188; *Townsend v. Newell*, 14 Pick. 332; *Steadman v. Hockley*, 15 Mees. & Wels. 557. An increased appreciable value of the property is not necessary to give the right, if skilful labor has been expended as directed: *Steinman v. Wilkins*, 7 W. & S. 466. Without the performance of services there cannot be a lien: *Lambert v. Robinson*, 1 Esp. 119.

*Possession.*—At common law there could be no lien when there was no possession: *The Bold Bucleugh*, 7 Moore P. C. 267.

The right is that of a security resting on property for the payment of a debt, and it cannot be separated either from the possession of the property or from the debt ; it is collateral to the debt, and it must accompany the possession : *Whitney v. Peay*, 24 Ark. 22 ; the lien is incident to the possession : *Kimball v. Ship Ann*, 2 Clifford C. C. 4. The criterion of title to personal property is, and always has been, possession, transfers of chattels corporeal being most frequently effected by mere delivery, unaided by formal conveyances or the sanction of a public registry ; and suffering the owner to remain in possession would enable him to defraud others ignorant of the lien : *Allen v. Spencer*, 1 Edm. 117. The possession must be lawful ; by an illegal or fraudulent act or breach of duty a lien cannot be acquired : *Randall v. Brown*, 2 How. 406 ; nor obtained by an act of fraud ; neither by a tortious conversion : *Hotchkiss v. Hunt*, 49 Me. 213.

II. HOW ACQUIRED.—1. By *common law* ; 2. By *usage* ; 3. By *statute* ; 4. By *contract*. By *common law* the right was originally confined to cases where persons, from the nature of their occupation, were under legal obligation, according to their means, such as common carriers, to receive and take care of the personal property of others. But at the present time the right, with very few, if any, exceptions, is given to every bailee for hire who has bestowed labor and expended means on the personal property of another : *Naylor v. Mangles*, 1 Esp. 109 ; per PARKE, B., in *Jackson v. Cummins*, 5 Mees. & Wels. 349 ; *Grinnell v. Cook*, 3 Hill 486 ; *Wilson v. Martin*, 40 N. H. 88. The law of lien was recognised in this country at an early day, and is a part of our common law : *McIntyre v. Carver*, 2 W. & S. 392.

*Usage*.—From the earliest times this right has been given by usage of trade, independent of special agreement, when there is no special contract inconsistent with its existence : *Morgan v. Congdon*, 4 Comst. 552 ; *Fielding v. Mills*, 2 Bosw. 489 ; *Hodgdon v. Waldron*, 9 N. H. 66. Liens arising from usage are of two kinds : *first*, of trade generally ; *second*, between the parties. To create the first kind the usage must be universal, uniform and have been sufficiently long continued to afford a presumption that it was known by the party to be affected by it : *Porter v. Hills*, 114 Mass. 106 ; *Homer v. Watson*, 62 Mo. 209 ; *Scudder v. Bradbury*, 106 Mass. 422. The lien of the second kind requires proof

of the parties having dealt upon the basis of such lien. Such proof will be presumptive evidence that the parties continue to deal upon the same terms.

When a lien is claimed by usage of trade, the fact and the extent of the usage are questions of evidence: *Marine Nat. Bank v. Nat. City Bank*, 59 N. Y. 67. The true office of a usage or custom is to interpret the otherwise indeterminate intention of parties: *The Reeside*, 2 Sumn. 569. A usage may be established by one witness: *Robinson v. United States*, 13 Wall. 363. But parol evidence of custom or usage is not admissible to contradict or vary an express contract: *Partridge v. Ins. Co.*, 1 Dillon C. C. 139; *Barnard v. Kellogg*, 10 Wall. 383.

*Liens by statute* include some of those which exist at common law, but have been modified by statutory enactments, and also those which subsist entirely by virtue of statutory regulations. Such liens are intended to secure the ends of justice when the possession is not with the lien claimant: *Beall v. White*, 94 U. S. 382, or where the exclusive possession is not possible. By statute, in nearly all the states, mechanics and material-men, or persons who furnish labor or materials for the construction of houses or other buildings, are entitled to what is known as a "mechanic's lien," which secures to the holder a preference over other creditors in the payment of debts out of buildings constructed of materials furnished, and to the land, to a greater or less extent, on which the buildings stand.

Statutory liens have, without possession, the same operation and effect that existed by common-law liens where the possession was delivered: *Beall v. White*, 94 U. S. 382. But the exercise of such statutory rights will not be extended beyond the powers plainly given: *Cairo & St. Louis Ry. Co. v. Watson*, 85 Ill. 531; *Tucker v. Shade*, 25 Ohio St. 355; and this rule applies to municipal liens: *Wilson v. Allegheny City*, 79 Penn. St. 272. To secure the rights conferred by a lien given by statute, its provisions must be complied with: *Hardin v. Marble County*, 13 Bush 58.

*Maritime Liens.*—A discussion of this branch of the subject is rendered unnecessary by the publication of the article on maritime liens, the conclusion of which immediately precedes this article, and to which the reader is referred.

*Lien by Contract.*—The right to create a lien by contract when none existed by law, is unquestionable: *Gregory v. Morris*, 96 U. S. 619. The effect of an express antecedent contract between the parties is to prevent an implied lien arising inconsistent with the terms of the contract: *Stevenson v. Blakelock*, 1 M. & Selw. 535; and it seems that when a lien by contract is relied upon, a lien at common law may be available if the contract is negatived: *Jackson v. Cummings*, 5 Mees. & Wels. 342.

*Lien on after-acquired Property ; Chattel Mortgage.*—To render effectual at law a provision in a chattel mortgage which is intended to be a lien on after-acquired property, the lien claimant must, after the property has been acquired by the mortgagor, obtain the possession thereof: *Chapin v. Cram*, 40 Me. 561; *Rowan v. Sharp's Rifle Manf. Co.*, 29 Conn. 282; *Titus et al. v. Mabee et al.*, 25 Ill. 257; *Rowley v. Rice*, 11 Metc. 333; *Carrington v. Smith*, 8 Pick. 419; *Jones v. Richardson*, 10 Metc. 481; *Moody v. Wright*, 13 Id. 17; *Barnard v. Eaton*, 2 Cush. 294; *Codman v. Freeman*, 3 Id. 306; *Chesley v. Josselyn*, 7 Gray 489; *Henshaw v. Bank of Bellows Falls*, 10 Cush. 568; *Chynoweth v. Tenney*, 10 Wis. 397; *Farmers' Loan & Trust Co. v. Commercial Bank*, 11 Id. 207; *Bryan v. Smith*, 22 Ala. 534; *Hunt v. Bullock*, 23 Ill. 320; *Single v. Phelps*, 20 Wis. 398; *Congreve v. Everts*, 10 Exch. 298; *Hope v. Hayley*, 5 E. & B. 830; *Gale v. Burnell*, 7 Q. B. 850; *Lunn v. Thornton*, 1 C. B. 379; *Robinson v. McDowell*, 5 W. & S. 228; *Williams v. Briggs*, 11 R. I. 476. Such a mortgage is considered as an executory agreement which operates as a license, authority or power, revocable in its nature, until the creditor is put into possession of the property at the time or after it comes into existence or is vested in the debtor. As soon as that new intervening act has intervened, the lien of the creditor becomes perfect, and in the absence of statutory regulations, prevails over the liens of subsequent executions: *McCaffrey v. Woodin*, 65 N. Y. 459.<sup>1</sup>

Such is the rule at law. Equity, however, regards such a mortgage as sufficient to charge the property when acquired, and with-

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<sup>1</sup> In Michigan, a chattel mortgage intended to bind after-acquired property, is held to be binding as between the parties to the mortgage, and also as to third parties having notice; the intervening act of the mortgagee is not requisite to perfect his lien: *American Cigar Co. v. Foster*, 36 Mich. 368; *Robson v. Michigan Central Railroad Co.*, 37 Id. 70.

out the intervening act of the mortgagee, with an equitable lien, or as creating an equitable title in it in favor of the mortgagee against the mortgagor; and some of the cases maintain that such is the rule against attaching creditors, especially when they have actual notice of the mortgage: *Holroyd v. Marshall*, 10 H. L. Cas. 191; *Mitchell v. Winslow*, 2 Story 630; *Pennock v. Coe*, 23 How. 117; *Galveston Ry. v. Cawdrey*, 11 Wall. 459; *United States v. Orleans Ry. Co.*, 12 Id. 362; *Butt v. Ellett*, 19 Id. 544; *Smithurst v. Edmunds*, 14 N. J. Eq. 408; *Seymour v. Canandaigua & Niagara Falls Ry. Co.*, 25 Barb. 284. The principle governing these decisions is, that the mortgage, though inoperative as a conveyance, is operative as an executory contract which attaches to the property when acquired, and in equity transfers the beneficial interest to the mortgagee, the mortgagor being held as a trustee for the former, in accordance with the familiar principle that equity considers that done which ought to be done.

The rights of parties in property subject to a lien by contract, is entirely a matter of intention of the parties; and the intention must be ascertained from the terms of the contract: *Read v. Fairbanks*, 13 C. B. 692. And when subject to the foregoing rule, the law is settled that when materials are delivered to a mechanic or manufacturer to be made into a chattel and returned, the completed article belongs to the party who furnished the materials; and the rule is the same when repairs are made upon a chattel, the original substance still constituting the principal portion, and the article retaining its identity: *Babcock v. Gill*, 10 Johns. 287; *Foster v. Pettibone*, 7 N. Y. 433; *Pulcifer v. Page*, 32 Me. 404; *Eaton v. Lynde*, 15 Mass. 242; *Stevens v. Briggs*, 5 Pick. 177. The mechanic may retain the property by virtue of his lien, and maintain an action for his services. But when the mechanic agrees to manufacture a certain article from his own materials, or even to provide the principal part thereof, the title is said to be in the mechanic until the thing is finished and delivered: *Atkinson v. Bell*, 8 B. & C. 277; *Gregory v. Stryker*, 2 Denio 628; *Merritt v. Johnson*, 7 Johns. 473; *McConihe v. N. Y. & Erie Ry. Co.*, 20 N. Y. 495; *Hesser v. Wilson*, 36 Iowa 152.

III. LIENS ARE GENERAL OR PARTICULAR.—General liens are claimed in respect of a general balance of account. They are founded on custom or special contract; they are *stricti juris*,

and are deemed encroachments on the common law, and are not favored: *Taylor v. Baldwin*, 10 Barb. 623; *Houghton v. Matthews*, 3 Bos. & Pull. 485. A lien, however, is sustained when it promotes public policy: *Wilson v. Guyton*, 8 Gill 215.

A particular lien on another's property is the right to retain it for the debt which arises on account of labor bestowed upon, or expense incurred in respect to, the identical property. The right was given by the common law, on the ground of public policy, to persons engaged in certain kinds of business. At the present time the right is given to all persons who take property in the way of their trade or occupation for the purpose of bestowing labor, care or expense upon it. The general rule is that one who bestows his labor on a thing, whether his labor is viewed as that of an ordinary mechanical employee, or that of an agent, has the right to retain the thing until he is paid for his labor and expenses incurred by virtue of his employment. But a sub-agent, as a journeyman employed by a contractor, sustains no personal relation to the principal owner; and, while the contractor may acquire a lien on property in his charge for the expense of the employment of the mechanic who has performed the labor, the mechanic acquires no lien.

IV. INCIDENTS OF THE RIGHT.—By common law a "lien" gives merely the right to retain possession: *Holly v. Huggeford*, 8 Pick. 73. It gives no title, and therefore a sale cannot be made, unless by express contract. The right, such as it is, is superadded to the holder's right to recover for his services by action: *Doane v. Russell*, 3 Gray 382. The right cannot be taken on execution, because an officer can seize only what he can sell; if a sale should be made it would destroy the right: *Legg v. Evans*, 6 Mees. & Wels. 36; *Kittridge v. Sumner*, 11 Pick. 50. Under a lien created by an attachment, subject to the rights of the lien claimant, the owner may make an absolute or a conditional sale of the property: *Bigelow v. Wilson*, 1 Pick. 483; *Denny v. Willard*, 11 Id. 519; *Fettyplace v. Dutch*, 13 Id. 388; *Calkins v. Lockwood*, 17 Conn. 154; *Arnold v. Brown*, 24 Pick. 89; *Wheeler v. Nichols*, 32 Me. 233. The court cannot make an order that the property shall be delivered to the plaintiff, for it is in the legal custody of the officer: *Blake v. Shaw*, 7 Mass. 505; nor can it be sold by the officer till after judgment and execution: *McKay v. Harrower*,

27 Barb. 463. The rights acquired by such lien are in no way superior to those which the defendant had in the property *at the time when the attachment was made*, except in cases of collusion and fraud. No interest subsequently acquired by the defendant in the property will be affected by the attachment: *Crocker v. Pierce*, 31 Me. 177.

As a general rule a lien is merged in a purchase of the property by the person who holds possession under his lien. But where subsequent to the giving of the lien, the owner has lost the power to sell, as by committing an act of bankruptcy, the purchase being in itself inoperative, will not divest the lien by way of merger, for the title of the property subject to the lien will pass to the assignees: *White v. Gainer*, 2 Bing. 23. A lien acquired under an illegal contract if an executed one may be good; as one arising under usury laws if they impose a penalty but do not invalidate the contract; or a contract made in violation of Sunday laws: *Scarfe v. Morgan*, 4 Mees. & W. 270. A lien though lost when the property is parted with, will revive upon an agreement expressly made, or by virtue of an usage, when the property is returned by the owner: *Spring v. Insurance Co.*, 8 Wheat. 286. But such revival is subject to any encumbrance which intermediately, while the property was in the owner's hands, attached to it: *Perkins v. Boardman*, 14 Gray 481. Whether a special lien for work or outlay on a particular article can thus be revived depends upon usage, or the intention of the parties: *Johnson v. The McDonough*, 1 Gilpin 101; *Robinson v. Larrabee*, 63 Me. 116. A lien is not forfeited if the lien-holder who had power to sell intrusts the property to the debtor for the purpose of making a sale: *Thayer v. Dwight*, 104 Mass. 254. Nor is the lien lost by temporarily loaning the property to the debtor: *Hutton v. Arnett*, 51 Ill. 198.

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(*To be continued.*)